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91-1506

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JOHN TERRY,
Petitioner,

v.

M/S "BIRTE" RITSCHER KG,
G RITSCHER Gmbh & CO.,
Respondent.

Petiton for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

1. In a suit for damages by a longshoreman under Section 5(b) of the Longshore and Harbor Worker's Compensation Act, is the vessel's duty to intervene, imposed by this Court in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), under circumstances where the stevedore's judgment in continuing to engage in cargo operations in the face of an apparent dangerous condition is so "obviously improvident" that it presents an unreasonable risk of harm to the longshoremen, an exception to the principle, also adopted in *Scindia*, that the vessel has no general duty to supervise cargo operations?

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v.

M/S "BIRTE" RITSCHER KG,
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, John Terry, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered December 20, 1991, affirming the granting of Summary Judgment in favor of respondent in the within proceeding, and in support thereof represents as follows:

OPINIONS BELOW

The Judgment Order of the United States Court of Appeal for the Third Circuit affirming the decision of the United States District Court for the District of New Jersey is not yet officially reported, and is reproduced in the appendix hereto at page 14a.

The Opinion of the United States District Court for the District of New Jersey is not yet officially reported, and is reproduced in the appendix hereto at page 1a.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on December 20, 1991 (14a) . The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTE INVOLVED

Section 5(b) of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §905(b).

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no

such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including, as the vessel's owner, owner pro hac vice, agent, operator or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided by this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

This is an action to recover damages for personal injuries suffered by Petitioner, John Terry, while employed as a longshoreman in the course of discharging containers from respondent's vessel.[1] After extensive discovery, respondent moved for Summary Judgment. Accordingly, the factual record upon which the District Court relied in determining the summary judgment motion was primarily drawn from the deposition testimony obtained during discovery. That discovery established the following facts.

On November 23, 1987, Petitioner was employed as a longshoreman by Trailer Marine Transport Corp., (hereafter "TMT"), a stevedore and terminal operator with terminal facilities at Petty's Island, Pennsauken, New Jersey. (1a-2a). On that day, TMT had been hired to discharge a cargo of containers from the M/V INDEPENDENT CONCEPT, a container ship owned by respondent, M/S "BIRTE" RITSCHER KG, G RITSCHER GMBH & CO., (hereafter

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1. The original parties in this action were the petitioner-plaintiff John Terry, respondent-defendant M/S "BIRTE" Ritscher KG, G Ritscher GmbH & Co. and Trailer Marine Transport Corporation, a subsidiary of Crowley Maritime Corporation. The decision of the District Court granting summary judgment in favor of Trailer Marine Transport was not appealed.

"M/S BIRTE") (la-2a).

A normal operation at TMT's Petty's Island facility was the loading and unloading of containers from vessels berthing at that terminal. The INDEPENDENT CONCEPT was one of the ships that was engaged in a regular service to Petty's Island (1a-2a).

Normally, containers are removed from a vessel by a crane located on the pier's surface (2a). However, as a result of the condition of the pier and the shallow depth of the water immediately adjacent to the pier, it was necessary for TMT to position floating barges between the vessel and the pier in order to provide a landing surface for containers being off-loaded from container ships (2a).

On November 23, 1987, two TMT barges were positioned between the INDEPENDENT CONCEPT and the pier. Each barge was 400 feet in length and 100 foot wide. Timber was placed over the steel deck of the barges so that tractor trailers could drive on their surfaces (2a).

The regular practice at Petty's Island was for containers to be lowered from the vessels onto truck "gooseneck" chassis. A "gooseneck" is a tongue-like device, several feet long, that slides into a groove located on the bottom on the containers. The gooseneck is inserted into the groove and the truck is backed up until the front of the container is placed against a bolster at the front of the chassis. Once the container is placed firmly against the bolster it is locked into place on the chassis (2a).

The INDEPENDENT CONCEPT is a container vessel which has the capacity of carrying 336 containers above deck and 236 containers in its two-cargo hatches below deck. It is equipped with two swinging hydraulic cranes used to unload containers from the vessel. These hydraulic cranes were not equipped with "trimline" stabilizing devices. Such stabilizing devices give the crane operator greater control over the side to side movement of the con-

tainer as it is being lowered (2a).

In the absence of such stabilizing devices, it was necessary for TMT to employ longshoreman as "groundmen" who functioned as human stabilizing devices in the course of receiving and steadying the containers, and assisting in inserting the groove of the containers onto the goosenecks of the truck chassis. In order to accomplish these maneuvers, it was necessary for the longshoremen/groundmen to place their hands on the containers while standing on the surface of the floating barges. These longshoremen would normally place one hand either underneath or in front of the container in order to effectively guide its movement (2a-3a).

The movement of the containers in the course of their discharge from the vessel was also influenced by the rolling of the vessel itself. It was a regular and common feature for the vessel to roll in a port to starboard or starboard to port fashion as the containers were swung over the adjacent barges and lowered down thereto. This rolling of the vessel from side to side would be enhanced or exaggerated when both cranes were in operation. Thus, the vessel would roll to the inshore side when the containers were positioned over the barges. If one container was released before the other, the vessel would roll back toward the offshore side (3a).

At any given point, it was possible for the vessel's deck officers to calculate the distance or degree of list which would occur when both cranes were discharging containers simultaneously. The deck officers were also able to calculate the distance the vessel would return toward its upright position when one container was released, and the speed with which the vessel would move back toward its original position upon the release of one container.

The deck officers of the INDEPENDENT CONCEPT were aware that as containers were discharged from the deck of the vessel, and more and more containers were discharged from its cargo holds, the tendency of the ship was to become "stiffer". If a vessel is "stiff", there is a

quicker response time as the vessel returns to its upright position. This is as opposed to a "tender" ship which tends to return more slowly to its upright position.

The rolling of the ICL vessels, including the M/V INDEPENDENT CONCEPT, would periodically cause a container to stick on the tongue of the gooseneck chassis. However, when the vessel would rock back toward its upright position, the container would often free itself and quickly slide forward on the gooseneck until it struck the bolster on the front of the chassis. This was particularly true when a tractor was backing a chassis up at the same time (3a-4a).

The officers of the INDEPENDENT CONCEPT were fully aware of the methods of discharge employed at Petty's Island. As previously indicated, the INDEPENDENT CONCEPT regularly called at Petty's Island prior to the accident with containerized cargo. Accordingly, the stevedoring personnel at TMT and the vessel's crews and officers had a regular working relationship in which the "vessel" knew the nature of the stevedoring operation (9a-10a).

On November 7, 1987, the INDEPENDENT CONCEPT departed from the Port of Hamburg, West Germany bound for Petty's Island, New Jersey with a full load of containers on deck and in its cargo holds. During the course of loading operations in Hamburg, stability calculations were made by the vessel's second officer. Accordingly, upon the vessel's arrival at Petty's Island, the ship's officers had actual knowledge regarding the vessel's stability characteristics.

On November 23, 1987, the Petitioner, John Terry, was working as a longshoreman/groundman, with two other longshoremen, on the southern barge adjacent to the after portion of the INDEPENDENT CONCEPT. Another "ground crew" was working the northern barge adjacent to the forward end of the vessel (3a).

The accident occurred between 12:45 and 12:50 p.m. At that time, both of the vessel's hydraulic cranes were in operation. Calculations prepared by the plaintiff's liability expert indicated that the offloading of two 40 foot 24 ton containers at the same time would have generated an eight degree inshore list, based on the stability characteristics of the vessel as of the time of the accident. The release of one of those containers would cause a four degree offshore list resulting in the lateral movement of the container still secured to the vessel's crane of approximately 16 inches (3a).

Petitioner and his fellow groundmen were in the process of positioning a container still secured to the vessel's crane onto the gooseneck of a truck chassis, when the container being offloaded at the forward end of the vessel was released from the forward crane. As Petitioner and his fellow longshoremen were getting the slot of the container onto the gooseneck, the container appeared to "hang-up" on a gooseneck. However, when the vessel rolled back offshore the movement of the ship caused the container to unstick and rapidly move forward toward the bolster of the chassis. The petitioner was unable to remove his right hand from the front of the container in time and it was crushed between the container and the bolster of the chassis (3a-4a).

In the opinion of petitioner's liability expert, the vessel's officers were negligent in permitting the stevedore operation in question to continue based on their actual knowledge of their own vessel's stability, or lack of same, and the nature of the cargo operation (10a).

The District Court acknowledged that there was no dispute among the parties that the vessel was aware of the rolling problem that resulted from the operation of both cranes. Although there remains a dispute between the parties as to whether the rolling constituted a danger, the District Court, for purposes of consideration of the motion for summary judgment, assumed that a jury could find that the nature of the vessel, coupled with the simultaneous opera-

tion of the cranes, created an unreasonably dangerous "work environment" for the longshoremen (9a-10a).

However, the District Court found that "the only way the vessel owner could eliminate the dangerous rolling condition would be to halt the stevedoring operations or require the use of only one crane" (13a-14a).[2] Based on that conclusion, the District Court held that "the duty to intervene would not be extended to the facts present here" since to do so would impose a duty to supervise cargo operations on the vessel owner (11a-12a).

REASONS WHY THE WRIT SHOULD BE GRANTED

1. **The decision below is in conflict with this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), as well as decisions of the Court of Appeals for the Fifth Circuit, in *Helaire v. Mobil Oil Co.*, 709 F. 2d 1031 (5th Cir. 1983), and the decision of the Court of Appeals for the Ninth Circuit in *Taylor v. Moram Agencies*, 739 F. 2d 1384 (9th Cir. 1984), in that it fails to recognize that the "duty to intervene" which this Court, in *Scindia*, imposed on a vessel owner under circumstances where the stevedore's judgment in continuing to engage in cargo operations in the face of an apparent dangerous condition is so "obviously improvident" that it presents an unreasonable risk of harm to the longshoremen, is an exception to the principle also adopted in *Scindia* that the vessel owner has no general duty to supervise cargo operations.**

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2. Plaintiff's liability expert also indicated that the dangerous condition could have been eliminated by landing the containers directly onto the deck surface of the adjacent floating barges and then having the containers picked up by shore equipment and positioned on truck chassis. This procedure would have eliminated any movement of the containers caused by the rocking of the vessel (11a).

In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), this Court held that, as to conditions arising *after* the start of cargo operations ". . . The shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore . . .". 451 U.S. at 172. Accordingly, this Court concluded that "The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he has no duty to inform himself." 451 U.S. at 172.

Having found no general duty of supervision or inspection once cargo operations have commenced, this Court, in *Scindia* then considered the nature of a vessel owner's duty when it in fact learns "That an apparently dangerous condition exists or has developed in the cargo operation, which is known to the stevedore and which may cause injury to the longshoremen." 451 U.S. at 172-73.

The "apparently dangerous condition" in *Scindia* involved a condition of the ship's winches. Acting within the confines of the facts of the particular case before it, this Court concluded ". . . That there are circumstances in which the shipowner has a duty to act where the danger to longshoremen arises from the malfunctioning of the ship's gear being used in the cargo operations." 451 U.S. at 156. Those "circumstances" were found by this Court to come into play when the stevedore's "judgment" was "so obviously improvident" that the vessel, "if it knew of the defect and that [the stevedore] was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen." 451 U.S. at 175-76. Under such circumstances the Court held that the vessel "had a duty to intervene and repair the ship's winch". Id. at 176.

In *Helaire v. Mobil Oil Co.*, 709 F. 2d 1031, 1036 (5th Cir. 1983) the Fifth Circuit described the *Scindia* duty to

intervene as follows:

> Third, even though the owner is generally relieved of responsibility for accidents which occur once the unloading process has begun, 'if [the stevedore's] judgment . . . was so obviously improvident that [the owner], if it knew of the defect and that [the stevedore] was continuing to use it, should have realized the [defect] presented an unreasonable risk of harm to the longshoremen, . . . in such circumstances [the owner] had a duty to intervene' and eliminate or neutralize the hazard . . . [3]

It is thus clear that the duty to intervene imposed by this Court and the Fifth Circuit on a vessel owner after cargo operations have commenced, is in fact an exception to the general rule that the shipowner has no duty to supervise or inspect the stevedore's cargo operations. See *Taylor v. Moram Agencies*, 739 F. 2d 1384, 1387-88 (9th Cir. 1984) where the Ninth Circuit described the duty of shipowner intervention as follows:

> The *Scindia* Court made it clear that the primary responsibility for maintaining a safe condition during cargo operations rests on the stevedore. An *exception* to this rule is recognized where a shipowner (1) has actual or constructive knowledge of a dangerous condition, (2) knows that the longshoremen are continuing to work despite the existence of an unreasonable risk of harm to them, and (3) could not reasonably expect that the stevedore would remedy the situation . . .

In this case, the District Court's decision granting summary judgment to the vessel owner, affirmed by way of Judgment Order by the Third Circuit, acknowledged the

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3. The bracketed material and omissions are contained in the original language of the Fifth Circuit's Opinion in *Helaire*.

existence of a duty to intervene but found that this Court "did not fully discuss the parameters of the duty to intervene in *Scindia*." (10a) The District Court recognized that there was no dispute between the parties that "the vessel was aware of the rolling problem that resulted from the operation of both cranes" (9a). In addition, the District Court expressly found that "reasonable jurors could differ on the issue of whether the lack of stabilizing devices coupled with the simultaneous operation of the cranes, although obvious, created an unreasonably dangerous work environment to experienced stevedores exercising reasonable care under the circumstances . . ." (10a).

The District Court then asked the following question:

> Intervention requires the vessel owner to eliminate the unsafe condition either himself or by requiring the stevedore to eliminate the unsafe condition. How could the dangerous condition have been eliminated by M/S BIRTE? (11a)

The District Court's answer to its own question was that "the only way the vessel owner could eliminate the dangerous rolling condition would be to halt the stevedoring operations or require the use of only one crane" (11a).[4]

Based on that conclusion, the District Court held:

> Ultimately the vessel owner will be required to supervise the cargo operations in order to insure that two cranes are not operated simultaneously. This would impose a duty of supervision on the vessel owner. *Scindia* compels the holding that the shipowner has no duty to supervise or inspect cargo loaded or unloaded

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4. The District Court did acknowledge that the petitioner's liability expert had also proposed that the dangerous condition could have been eliminated by landing the containers directly on the barge as opposed to truck chassis (11a).

by stevedores and therefore may not be held liable for injuries arising out [of] the stevedore's failure to perform his job properly'. *Derr*, 835 F. 2d at 490.[5] 'It would be inconsistent with the [Longshoremen's and Harbor Workers' Compensation] Act to hold . . . that the shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process.' *Scindia*, 451 U.S. at 168-69. Accordingly, the duty to intervene will not be extended to the facts present here. (11a-12a)

The District Court in this case has confused the absence of a general duty to supervise or inspect cargo operation with the exception to that rule created by this Court in *Scindia* when the evidence indicates that the vessel owner has actual knowledge of a dangerous condition within the confines of the cargo operation, knows that the longshoremen are continuing to work despite the existence of an unreasonable risk of harm to them and cannot reasonably expect that the stevedore will remedy the situation. Clearly, the duty to intervene creates an obligation on the part of the shipowner to take some form of positive action - whether by way of supervision of cargo operations or otherwise, either to make the stevedore eliminate the unsafe condition or to eliminate the unsafe condition itself.

By holding that the duty to intervene does not apply when the intervention would require supervision of cargo operations by the vessel owner, the Courts below have placed an unduly limited construction on the duty to intervene established by this Court in *Scindia* in a manner which conflicts with decisions of the Fifth and Ninth Circuits. Indeed, if permitted to stand, the holding of the Courts below would be tantamount to eliminating *sub silento*, the

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5. The *"Derr"* citation is to the Third Circuit's decision in *Derr v. Kawasaki Kisen, K.K.*, 835 F. 2d 490 (3rd Cir. 1987), *cert. den'd.*, 486 U.S. 1007 (1988).

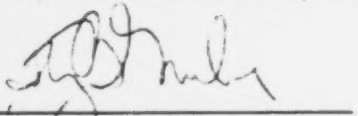
duty to intervene established by this Court in *Scindia* since vessel owner intervention, whether by means of suspending stevedoring operations or correcting them, invariably involves some form of supervisory conduct on the part of the vessel owner.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the Opinion and Judgment of the courts below.

Respectfully submitted,

FREEDMAN AND LORRY, P.C.

By 

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN TERRY, Plaintiff,	:	Hon. Joseph H. Rodriguez
	:	Civil Action No. 88-4989
v.	:	
	:	ORDER
M/S "BIRTE" RITSCHER KG, et al., Defendants.	:	

I. INTRODUCTION

This matter comes before the court on plaintiff's, John Terry, and defendant's Trailer Marine Transport Corporation (TMT), motion for reconsideration of the order entered on October 22, 1990. In prior order, summary judgment was granted in favor of defendant, M/S BIRTE RITSCHER KG, G. RITSCHER Gmbh & Company (M/S BIRTE), but denied as to TMT. That decision will be reconsidered in order to review additional factual and legal submissions.

II. BACKGROUND

Plaintiff, John Terry, was injured while working as a longshoreman for TMT, as independent stevedoring company. On November 23, 1987 TMT was hired to unload cargo from the M/V INDEPENDENT CONCEPT. Plaintiff was a member of the crew that was responsible for unloading containers from the INDEPENDENT CONCEPT. The INDEPENDENT CONCEPT was owned by M/S BRITE but was time chartered to Independent Container Line.

The marine terminal operated by TMT is located at Petty's Island, Pennsauken, New Jersey. The normal operation at TMT's Petty Island facility is the loading and unloading of con-

tainers from vessels that berth at the terminal. Independent Container Line is a shipping line that uses container vessels. The INDEPENDENT CONCEPT was one of the ships that was engaged in regular service at Petty's Island.

The INDEPENDENT CONCEPT is equipped with two swinging hydraulic cranes used to unload containers from the vessels. The hydraulic cranes are not equipped with "trim line" stabilizing devices. The stabilizing devices give the crane operator greater control over the side to side movement of a container as it is being lowered. See Deposition of Kevin P. Horvath at 65-67.

Normally containers are removed from a vessel by a gantry crane located on the pier surface. However, plaintiff asserts that the pier at Petty's Island is too "dilapidated" to support a gantry crane. Also, the water depth at the pier is insufficient to allow vessels to berth against the pier. As a result, TMT positions barges between the vessel and pier in order to provide a landing surface for the containers.

Two barges, 406-7 and 450-10, were positioned between the INDEPENDENT CONCEPT and the pier. Each barge is 400 feet in length and 100 feet wide. The barges are owned by TMT. The barges have steel decks over which timber is laid so that tractor trailers can drive on their surface. At the end of each barge are ramps for the trucks to use to drive on and off. The barges are secured to the pier and each other by wire cables.

At Petty's Island the containers are lowered from the vessels onto truck "gooseneck" chassis. The gooseneck is a tongue like device, several feet long, that slides into a groove located on the bottom of the containers. The gooseneck is inserted into the groove and the truck is backed up until the front of the container is placed against the bolster at the front of the chassis. Once the container is placed firmly against the bolster it is locked into place.

The cranes on the INDEPENDENT CONCEPT did not have

stabilizing devices, thus TMT employed groundmen to assist in guiding the containers into the gooseneck on the truck chassis. In order to accomplish this, the groundmen had to place their hands on the containers. The groundmen would normally place one hand either underneath or in front of the container.

The containers were also influenced by the rolling of the vessel itself. When containers were swung from the vessel and lowered, the vessel would roll from side to side. The rolling was exaggerated when both cranes were in operation. The vessel would roll to the inshore side when the containers were positioned over the barges. If one container was released before the other, the vessel would roll toward the offshore side. A report submitted by Captain John Schindler indicates that the offloading of two 40 foot 24 ton containers at the same time would generate an 8 degree inshore list. The release of one of the containers would cause a 4 degree offshore list resulting in a container moving laterally approximately 16 feet. The rolling of the vessel occasionally caused a container to stick on a truck chassis. When the vessel rolled back to its upright position the container would unstick and quickly slide forward against the bolster.

On November 23, 1987 plaintiff was working as a groundman on the southern barge adjacent to the after portion of the INDEPENDENT CONCEPT. He was working with two other groundmen, Mark Gray and Joseph Kerns. As stated previously, their function was to guide the container into the gooseneck as the containers were lowered from the vessel by the hydraulic cranes. Along with the groundmen was a checker who was employed by TMT to work with the ground crew. The checker's function is to see that the containers are discharged in proper order and to keep a record of the time of discharge.

The accident occurred between 12:45 and 12:50 p.m. The checker's report indicates that both of the vessel's hydraulic cranes were in operation at the time. Plaintiff contends that both of the vessel's cranes had swung 40 foot containers over the barges thereby generating an 8 degree list. Plaintiff and the two other groundmen were working on the south barge positioning a

container into the gooseneck of a truck chassis. At the time plaintiff had his hand in front of a container when it became stuck on the gooseneck.

When the forward crane released the container it was lowering, the vessel rapidly rocked back righting itself. The rocking of the ship allegedly caused the container to unstick and move forward toward the bolster of the chassis. Plaintiff was unable to remove his right hand from the front of the container in time causing it to be crushed against the bolster of the chassis.[1]

Plaintiff has brought suit against TMT and M/S BIRTE pursuant to the Harbor Workers Compensation Act, 33 U.S.C. § 905(b). TMT and M/S BIRTE move for summary judgment.

III. DISCUSSION

A. Summary Judgment Standard

The entry of summary judgment is appropriate only when "there is no genuine issue of material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Whether a fact is indeed "material" is determined by the controlling substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If a disputed fact exists that under the controlling substantive law might affect the outcome of the suit, then entry of summary judgment is precluded. Id. The moving party bears the responsibility of informing the district court of the basis for its motion. Celotex, 477 U.S. at 323. This party must identify

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1. Apparently, immediately prior to the accident the truck was backing the chassis very slowly. Deposition of Joseph Kerns at 82. Plaintiff states that when a container is stuck on the gooseneck and the truck is backing up it will have the effect of causing the chassis to move the container in a backward direction. When the container unsticks, the backing of the truck will cause the container to slide forward rapidly.

those portions of the pleadings, discovery papers and affidavits (if any) which demonstrate that no genuine issue of material fact exists. Id. Once the moving party has satisfied these requirements, the burden then shifts to the nonmoving party to present affirmative evidence that a material fact is genuine. If the evidence is such that "a reasonable jury might return a verdict in his favor," summary judgment will not be granted. Anderson, 477 U.S. at 248, 257.

B. Longshoremen's and Harbor Workers Compensation Act

Section 905(b) of the Longshoremen's and Harbor Worker's Compensation Act provides in pertinent part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel.... The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

Scindia Team Navigation Co. v. De Los Santos, 451 U.S. 156 (1981) governs the standard of care applicable to vessel negligence under the Longshoremen's and Harbor Worker's Compensation Act. The Third Circuit in Derr v. Kawaski Kisen K.K., 835 F.2d 490 (3rd Cir. 1987) determined that the Scindia decision imposes four distinct duties upon a vessel owner; (1) duty to inspect and supervise; (2) duty to ship and equipment; (3)

duty to intervene; and (4) duty to warn.

1. M/S BIRTE's Motion for Summary Judgment

Plaintiff contends that M/S BIRTE breached the duty to ship and equipment and the duty to intervene. Plaintiff concedes that the other duties are inapplicable to M/S BIRTE.

a. Turnover Duty

The duty for ship and equipment has also been referred to as the turnover duty. In Derr the court defined the vessel's duty with respect to ship and equipment as follows:

> to exercis[e] ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons or property, and to warn( ) the stevedore of any hazards on the ship or with respect to its equipment that are known to it in the exercise of reasonable care, that would likely be encountered by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Derr, 835 F.2d at 495 (quoting Scindia, 451 U.S. at 167).

The duty for ship and equipment includes two distinct duties. (1) The turnover duty of safe condition as it relates to the condition of the vessel before it is turned over and (2) the turnover duty to warn the stevedore of any hazards on the ship or with respect to equipment that are not open and obvious to the stevedore. Bjaranson v. Bothelho Shipping Corp. v. Manila, 873 F.2d 1204, 1207 (9th Cir. 1989). Plaintiff alleges that M/S BIRTE breached the turnover duty of safe condition but not the turnover duty to warn. Plaintiff claims that M/S BIRTE breached the turnover duty of safe condition by failing to exercise ordinary care under the circumstances to have its vessel and

cargo cranes in such condition that an expert and experienced stevedore by the exercise of reasonable care could carry on the cargo operations in question with reasonable safety to persons and property. More specifically, plaintiff alleges that the instability of the ship coupled with the absence of stabilizing devices on the hydraulic cranes rendered the vessel unsafe for cargo operations.

Initially it must be determined if the vessel was unsafe for cargo operations because it did not have stabilizing devices on its cranes. The testimony that stabilizing devices could give the crane operator more control over the containers as they are lowered did not indicate that the hydraulic cranes on the INDEPENDENT CONCEPT were defective. See Deposition of Kevin Horvath at 65-67. The fact that stabilizing devices may make the cranes safer does not prove that the cranes are in a defective or unsafe condition without them. Without evidence of defect it can not be concluded that the hydraulic cranes were in an unsafe condition prior to turnover or that they malfunctioned.

Furthermore, there is no evidence that the accident would not have occurred if stabilizing devices had been installed on the cranes. The essence of plaintiff's claim is that the simultaneous operation of the two cranes resulted in excessive rolling of the vessel thereby causing a dangerous condition that contributed to the happening of the accident. The question then is whether a vessel with two cranes which are not equipped with stabilizing devices renders the vessel unsafe prior to turnover. Plaintiff has produced no evidence that establishes that a vessel with two hydraulic cranes unequipped with stabilizing devices is defective or unsafe.

The alleged dangerous condition is not the result of a defect or unsafe condition on the vessel but is the result of a combination of factors. The factors include the lack of stabilizing devices on the cranes, the operation of two cranes at the same time, the floating buoyant barges, the use of gooseneck chassis, and the need for the stevedore to stabilize the containers by positioning his hands on the containers. Ultimately, plaintiff's contention is that the operation of two cranes simultaneously in combination

with the above factors caused the dangerous condition.[2]

Thus, the dangerous condition is not directly related to the ship or its equipment but instead is essentially an operational hazard, i.e., when two cranes are operated simultaneously in combination with a number of other factors, some related and some not related to the vessel itself.

Since the hazard is operational and not related specifically to the ship or its equipment plaintiff's claim moves outside of the turnover duty of safe condition and into the duty to intervene. "A vessel owner's duty to intervene arises only when the unsafe condition develops or becomes obvious after the vessel is turned over to the stevedore." Martinez v. Korea Shipping Corp., Ltd., 903 F.2d 606, 611 (9th Cir. 1990). Here the alleged dangerous condition developed during cargo operations. It was not present at the time of turnover. The duty to correct the condition did not exist at the time of turnover because the vessel owner could not have stopped the simultaneous operation of the two cranes until after the ship had been turned over to the stevedores. As stated above plaintiff does not contend that the turnover duty to warn was breached. Accordingly, the turnover duty was not breached by M/S BIRTE.

b. Duty to Intervene

The Supreme Court did not fully discuss the parameters of the duty to intervene in Scindia. Derr, 835 F.2d at 496. "The only discussion in that opinion related to the shipowner's 'duty to act where the danger to longshoremen arises from the malfunc-

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2. Plaintiff does not claim that M/S Birte breached the turnover duty to warn even though the stevedores were not warned that only one crane should be operated because the danger here was open and obvious to the stevedores. Moreover, there is testimony that the stevedores were aware for some time prior to the accident here that two cranes were operated simultaneously during the discharge of cargo.

tioning of the ship's gear being used in the cargo operation.'" Id. (quoting Scindia, 451 U.S. at 175). "The Scindia Court was prepared only to hold that if it were proven that the ship knew of the malfunctioning cargo winch that was part of the ship's own gear, and which it might have a duty to repair, there was a basis for imposition of the negligence liability." Id. The Third Circuit has held that "[i]t is unlikely that the narrow duty of a ship to intervene to make repairs was intended to extend beyond defective conditions with respect to the ship, its equipment, and gear." Id. (citations omitted). Thus, the "vessel owner may have a duty to act if the owner is aware of the danger, aware that the stevedore is continuing to use the malfunctioning equipment and the stevedore's judgment in continuing to use the equipment is 'obviously improvident.'" Brown v. Philippine President Lines, Inc., 704 F. Supp. 606, 609 (E.D. Pa. 1989); see also Whitfield v. Craqwin Co., Ltd, 727 F. Supp. 183 (E.D. Pa. 1989).

In order to establish a claim there must be a defect in the ship, its equipment, or gear. The normal type of defect has been either a hidden defect on the vessel or malfunctioning equipment. Consistent with the conclusion reached in part III(B) (1) (a) simply having a vessel equipped with two hydraulic cranes without stabilizing devices did not create a defective condition on the vessel sufficient to give rise to a duty to intervene.

Plaintiff contends that M/S BIRTE breached the duty to intervene by failing to correct the dangerous condition brought about by the combination of the instability of the vessel and the method of discharge selected by the stevedore. He contends that the work should have been stopped until the condition was corrected because the vessel knew that the longshoremen either could not or would not correct the condition. Assuming the lack of stabilizing devices coupled with the simultaneous operation of the cranes is sufficient to invoke the duty to intervene, the other elements must still be satisfied.

There is no dispute among the parties that the vessel was aware of the rolling problem that resulted from the operation of both cranes. But there is a dispute as to whether the rolling

constituted a danger. The INDEPENDENT CONCEPT has been discharging containers with two cranes for approximately three years yet no evidence is presented of other accidents involving stevedores working under these conditions, even though that fact alone does not necessarily mean that the operation of the two cranes together did not create a dangerous condition. The next question is whether the vessel was aware that the stevedore's judgment has been so "obviously improvident" that allowing the stevedore to continue to work with the condition posed an unreasonable risk of harm to the stevedore.[3] Generally, that question is left for a jury to resolve. See Callen v. Oulu O/Y, 711 F. Supp. 244, 248 (E.D. Pa. 1989); Martinez, 903 F.2d at 610.

However, to deny summary judgment because reasonable jurors could differ on the issue of whether the lack of stabilizing devices coupled with the simultaneous operation of the cranes, although obvious, created an unreasonably dangerous work environment to experienced stevedores exercising reasonable care under the circumstances, would be to acknowledge that M/S BIRTE may have had a duty to intervene under the circumstances present in this case. And if the duty to intervene is imposed upon M/S/ BIRTE the question of how M/S BIRTE could have intervened must be answered. Put more simply, assuming that the stevedore was presented with an unreasonably dangerous work environment, what should the vessel have done to remedy the problem?

"[I]f the shipowner has actual knowledge that equipment in the control of the stevedore is in an unsafe condition, and a reasonable belief that the stevedore will not remedy that condition, the shipowner has a duty either to half the stevedoring operation, to make the stevedore eliminate the unsafe condition,

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3.It is the opinion of plaintiff's expert, Captain John Schindler, that the vessel's officers were negligent in permitting the operation to commence or continue based on the fact that the officers were aware of the vessel's instability and the resulting unsafe stevedoring operation.

or to eliminate the unsafe condition himself." Scindia, 451 U.S. at 179 (Brennan, J., concurring). Intervention requires the vessel owner to eliminate the unsafe condition, either himself or by requiring the stevedore to eliminate the unsafe condition. How could the dangerous condition have been eliminated by M/S/ BIRTE?

Equipping the cranes with stabilizing devices would not have answered the question because the condition was predominantly the result of operating two cranes simultaneously. Nor would a warning have eliminated the condition because the stevedores were aware of the rolling that occurred. Would the vessel owner have to remove one of the cranes to remedy the condition? It appears that the only way the vessel owner could eliminate the dangerous rolling condition would be to halt the stevedoring operations or require the use of only one crane."[4]

Ultimately the vessel owner will be required to supervise the cargo operations in order to insure that two cranes are not operated simultaneously. This would impose a duty of supervision on the vessel owner. "Scindia compels the holding that the shipowner has no duty to supervise or inspect cargo loaded or unloaded by stevedores and therefore may not be held liable for injuries arising out [of] the stevedore's failure to perform his job proper-

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4. Another way the dangerous condition could have been eliminated would have been to change the method of discharge of cargo from the vessel. Captain Schindler suggests that the containers could have been off loaded from the vessel and landed on the barge, then picked up by shore equipment and positioned on the truck chassis and that would have eliminated any movement of the containers caused by the vessel's movement. However, the method of operation chosen by the stevedores is district from a dangerous condition on the vessel. The method of operation chosen by the stevedores, even if negligent, is insufficient to invoke the duty to intervene. The duty to intervene only arises when there is a defect with respect to the ship, its equipment, or its gear. The vessel owner has no duty to oversee the stevedore's activity during the loading or unloading process. See Scindia, 451 .S. at 169.

ly." Derr, 835 F.2d at 490. "It would be inconsistent with the [Longshoremen's and Harbor Worker's Compensation] Act to hold...that the shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the loading and unloading process." Scindia, 451 U.S. at 168-69. Accordingly, the duty to intervene will not be extended to the facts present here.

2. TMT's Motion for Summary Judgment

TMT is the owner of the two barges positioned between the INDEPENDENT CONCEPT and the pier. As the facts are now presented the only evidence that the barges were in an unsafe condition at the time of turnover is that they were buoyant. Buoyancy alone, however, does not make the barges unsafe, it is a natural condition of floating barges. Thus, TMT did not breach the turnover duty because the barges were in a safe condition at the time of turnover to the stevedore.

At oral argument counsel for plaintiff stated that TMT breached the duty to intervene. It was suggested that TMT's duty to intervene was not to eliminate an unsafe condition with respect to the barges but to intervene and correct the dangerous condition that resulted from the discharge of cargo from the INDEPENDENT CONCEPT. Plaintiff claims that since TMT knew that the INDEPENDENT CONCEPT was going to dock at Petty's Island and was aware of the dangerous condition that arises during the discharge of cargo from the vessel they should have intervened and prevented the problem.

Liability is imposed on vessel owners if injuries result from their failure to intervene and correct dangerous conditions on ship that they own. Plaintiff has cited no authority where the duty to intervene was imposed on a vessel owner who failed to correct a dangerous condition on a vessel owned by another. We will not extend the liability here. To hold otherwise would require TMT to eliminate a condition on the INDEPENDENT CONCEPT. TMT did not breach the duty to intervene because there is no evidence that there was a defective or dangerous condition on the

barges themselves.

IT IS, THEREFORE, on this 24th day of April, 1991, ORDERED that the order entered on October 22, 1990 is hereby VACATED; and

IT IS FURTHER ORDERED that defendants, M/S BIRTE, RITSCHER KG, G RITSCHER GmbH & Co. and Trailer Marine Transport Corporation, motions for summary judgment pursuant to Rule 56(c) are GRANTED.

s/ JOSEPH H. RODRIGUEZ
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5468

JOHN TERRY,
Appellant

v.

M/S "BIRTE" RITSCHER KG;
G RITSCHER GMBH & CO.;
and TRAILER MARINE TRANSPORT CORPORATION

Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 88-04989
(Honorable Joseph H. Rodriguez)

Submitted December, 12, 1991

Before: SLOVITER, Chief Judge,
SCIRICA and ROTH, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

s/ A. J. SCIRICA
Circuit Judge

Attest:

s/ Sally Mrvos
Sally Mrvos, Clerk

December 20, 1991